TL MAC MOTORSPORT SDN BHD A

v.

MITSUBISHI MOTORS MALAYSIA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[SUIT NO: D11-22-64-2009]
22 DECEMBER 2011

CONTRACT: *Guarantee - Bank guarantee - Call on bank guarantee by distributor of motor vehicles upon dealer's non-payment for vehicles ordered within three days - Contract stipulating 3-day payment requirement but parties in practice dealing on 7-day payment requirement failing which vehicles redistributed to other dealers - Whether distributor reverting to 3-day payment requirement reasonable - Whether call on bank guarantee proper - Contracts Act 1950, s. 74(1)* C D

The plaintiff was a dealer of Mitsubishi vehicles and operated a 3S centre which was a sales, service and spare parts centre for Mitsubishi vehicles. The defendant was the distributor for Mitsubishi vehicles. The contractual relationship between the parties was governed by the Dealer Sales and Service Agreement ('DSSA'). The duration of the DSSA was from 9 April 2007 until 8 April 2009. The DSSA provided for a minimum purchase requirement of 141 vehicles for the next 17 months from its commencement date and the plaintiff had purchased a total of 283 vehicles throughout the DSSA, *ie*, well above the minimum requirement. The plaintiff also provided a bank guarantee ('BG') in favour of the defendant in the amount of RM500,000 being security deposit for the purchase of the vehicles from the defendant. The BG was for the period of 1 July 2008 until 31 December 2008. Notwithstanding that the DSSA provided that the dealer make payment to the distributor within three days from the placing of its order for the vehicles, the actual dealings between the parties were premised on proforma invoices issued by the defendant. The proforma invoices provided that the plaintiff make payment within seven days failing which the vehicles would be redistributed to other dealers without notice. It followed that due to the downturn in the economy, the plaintiff proposed to the defendant that it would downgrade its 3S centre to a 2S centre, E F G H I

ie, service and spare parts only *via* its letter dated 24 November 2008. The defendant rejected the plaintiff's proposal *via* its letter dated 16 December 2008. On 23 December 2008, the defendant issued proforma invoices for 80 vehicles but this time to be paid by the plaintiff within three days, *ie*, on/or before 26 December 2008 and not the usual seven days. The amount invoiced was RM9,368,035.10. The plaintiff failed to make the payment within three days and the defendant called on the BG on 31 December 2008.

The plaintiff in this action against the defendant primarily claimed that the call made on the BG was unconscionable based on the following (i) that the defendant had always led the plaintiff to believe that their dealings had been on a 7-day payment requirement and not three days (ii) that the defendant generated the proforma invoices for the 80 vehicles for the purpose of calling on the BG which expired on 31 December 2008 evidenced from the fact that the proforma invoices for the vehicles were dated 23 December 2008 (iii) that the defendant knew that the plaintiff could not make payment within three days (iv) that the defendant never practised nor enforced the 3-day payment term, and (v) that the defendant did not deliver the 80 vehicles to the plaintiff presumably for non-payment and had in fact redistributed them to other dealers. The defendant counterclaimed for losses and damages arising out of the plaintiff's failure to make payment for the 80 vehicles which included their storage costs.

Held (allowing plaintiff's claim in part and dismissing defendant's counterclaim):

(1) For the entire duration of the contract from 9 April 2007 until 24 November 2008, there were no complaints from the defendant about the plaintiff as the defendant was undeniably satisfied with the plaintiff meeting the minimum order and purchase of 141 vehicles for the next 17 months from the commencement of the dealership on 9 April 2007. The plaintiff had in fact purchased a total of 283 vehicles throughout the DSSA. The sudden change in the defendant's conduct was triggered by the plaintiff's proposal made on 24 November to downgrade its 3S centre to a 2S centre. The unconscionable conduct of the defendant could be seen on how it went into action in searching for 80 vehicles that it claimed the plaintiff

failed to pay and invoiced accordingly giving only three days to pay so as to justify the calling on the BG which would have expired on 31 December 2008. (paras 33-36)

(2) Where the parties conduct their business affairs and arrangements at variance with the original terms of the contract and evince by conduct not to be bound by the original terms of the contract, then such a conduct should prevail in preventing the parties from reverting to the original terms of the contract where to do so would be both unreasonable and unconscionable in the circumstances of the case (*Pinsia Development Sdn Bhd & Ors v. Hj Abdul Hadi Ahmad & Ors*; refd) (para 37)

(3) The plaintiff suffered loss and damage as a result of relying on the defendant's representation that the 80 vehicles were previously cancelled. The plaintiff's loss was the BG's amount of RM500,000. None of the 80 vehicles were delivered to the plaintiff presumably because the plaintiff did not pay for them and for that the defendant asserted that the sum of RM500,000 was forfeited. Such an assertion must be rejected as it was completely at variance with the business arrangement that the parties had avidly followed. (para 48)

(4) The defendant's basis for calling on the BG premised upon the proforma invoices for the 80 vehicles dated 23 December 2008 was wrong and unlawful because (a) the proforma invoices for the 80 vehicles dated 23 December 2008 were not genuine orders by the plaintiff and/or were in fact orders retrieved from previous cancelled orders (b) the 80 vehicles could not be attributed in any manner to any particular contracts of sale, and (c) if the 80 vehicles were in fact different vehicles from the 80 that were redistributed then the basis of the call made on the BG would have occurred at the time when the 80 vehicles were not taken and redistributed. (para 50)

(5) By redistributing the 80 vehicles to other dealers, the defendant was duty bound to mitigate its losses as it would be unreasonable for the defendant to store them for an unspecified period of time. However, it must be recognised that the dominant purpose of the release of the 80 vehicles and its reallocation was for the optimisation of the sales of the

vehicles such that both the distributor and the dealer benefit in the overall common objective of maximising sales to the non-detriment of either party. (para 60)

(6) The plaintiff's claim for RM9,307.51 for interest it would have earned on the sum of RM500,000 being fixed deposit that it had placed with the bank for the issuance of the BG should be allowed as "compensation for any loss or damage caused, that naturally arose in the usual course of things" from the unlawful and unconscionable call by the defendant on the BG within the meaning of the first limb of s. 74(1) of the Contracts Act 1950. (para 61)

(7) There was no basis for the defendant's counterclaim as the plaintiff could not be said to be in breach of the DSSA and the contract of sales. The defendant's counterclaim was only contrived and calculated after the plaintiff filed its claim. The plaintiff was never billed nor invoiced for storage charges, finance charges and the like in the past. (para 66)

Case(s) referred to:

Amalgamated Investment & Property Co Ltd (In Liquidation) v. Texas Commerce Bank [1981] 3 All ER 577 ***(refd)***

Habib Bank Ltd v. Habib Bank AG Zurich [1981] 2 All ER 650 ***(refd)***

Kabatasan Timber Extraction Company v. Chong Fah Shing [1969] 1 LNS 63 FC ***(refd)***

Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294 CA ***(refd)***

Pinsia Development Sdn Bhd & Ors v. Hj Abdul Hadi Ahmad & Ors [2005] 1 CLJ 416 CA ***(refd)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***

Teknik Cekap Sendirian Berhad v. Public Bank Berhad [1995] 4 CLJ 697 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74(1)

Evidence Act 1950, ss. 92, 114(g)

For the plaintiff - Jason Yeo; M/s Yeap, Yong & Amy

For the defendant - Wong Chun Keat (Christopher Arun with him); M/s Zaid Ibrahim & Co

Reported by Usha Thiagarajah

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] In a business relationship, there must be the element of mutual benefit for the relationship to grow. No one enters into such a relationship unless there is a reasonable return on the investment on time and money. The relationship between a dealer and distributor of motor vehicles is no different. Little wonder that parties might want to set an initial term of a year or two before deciding to continue further. As there are expectations of each other, the obligations of the dealer and distributor would be clearly spelt out in the agreement.

[2] Of prime importance is the number of vehicles that the dealer should sell during the term of the dealership. Here is a case where the dealer has met such an expectation and target but when it decided to downgrade from a 3S centre to a 2S centre towards the end of its dealership, the distributor takes a sudden confrontational stance that led to the distributor forfeiting the RM500,000 bank guarantee furnished by the dealer. The dealer cried foul and the distributor declared the dealer to be in default.

[3] This case explores the true nature of the contractual relationship between the plaintiff/dealer and the defendant/distributor and the rightness and reasonableness or otherwise of the actions that the parties have taken in the events that erupted after the dealer had evinced an intention to downgrade from a 3S centre to a 2S centre.

Parties

[4] The plaintiff at the material time was a dealer of Mitsubishi vehicles and operates a 3S centre which is a sales, service and spare parts centre for Mitsubishi vehicles. The defendant is the distributor for Mitsubishi vehicles. The contractual relationship between the parties is governed by the Dealer Sales and Service Agreement (DSSA) dated 9 April 2007.

[5] The duration of the DSSA was from 9 April 2007 till 8 April 2009.

[6] The DSSA provided for a minimum purchase requirement of 141 vehicles for the next 17 months from the commencement date (refer p. 10 and 39 bundle D). The plaintiff purchased a total of 283 vehicles throughout the DSSA (pp. 13-16 bundle H).

[7] The plaintiff provided a bank guarantee dated 1 July 2008 in favour of the defendant to the amount of RM500,000 being 'security deposit for purchase of Mitsubishi Passenger Car' from defendant (p. 1 bundle D). The bank guarantee was for the period 1 July 2008 till 31 December 2008.

Problem

[8] The defendant issued Proforma Invoice for vehicles that were ordered by the plaintiff. Vehicles that were not paid within the seven days due date of the Proforma Invoices were redistributed by the defendant to other dealers without notice. Due to a downturn in the economy the plaintiff proposed to downgrade from a 3S centre to 2S centre (service and spare parts only) *via* its letter of 24 November 2008.

[9] The defendant rejected the plaintiff's proposal to downgrade *via* letter dated 16 December 2008. After that a series of events happened in quick succession. On 23 December 2008 the defendant issued Proforma Invoice for 80 vehicles all dated 23 December 2008 to be paid by the plaintiff on or before 26 December 2008. However the Contracts of Sale contained only information of vehicle model, quantity and unit price.

[10] The 80 vehicles for which the plaintiff had been invoiced by the defendant had been redistributed on various dates to other dealers already. (pp. 1253-1254 bundle G)

[11] The amount invoiced was RM9,368,035.10 and the defendant called on the bank guarantee on 31 December 2008 by reason of non-payment of the said sum.

[12] The 80 different vehicles were not delivered to date and the defendant is still keeping the RM500,000 that had been forfeited.

Prayers

[13] The plaintiff claimed *inter alia* for:

(a) A declaration that the defendant was not under any circumstances entitled to make any claim whatsoever against the bank guarantee issued by AmBank (M) Berhad dated 1 July 2008 in favour of the defendant;

(b) A declaration that any claim on the bank guarantee by the defendant under the Proforma Invoice stated is invalid;

(c) A declaration that the plaintiff does not have any amount owing to the defendant under the said Proforma Invoices.

[14] The plaintiff had also claimed damages of RM550,581.96 under various heads of claims set out in para. 20 of its amended statement of claim.

[15] The defendant meanwhile had counterclaimed *inter alia* for losses and damages arising out of the plaintiff's failure to pay for the sums due and owing to the defendant for the 80 vehicles. The counterclaim of RM663,579.38 consisted of storage costs (RM54,305), interest chargeable at the rate of 1% above the Base Lending Rate of 5.96% calculated from the expiry of the time period for full payment (as per the Proforma Invoices) until 16 February 2009, discount for resold vehicles (RM239,500) and interest rate subsidy for resold vehicles (RM112,800).

Parol And Paper Evidence

[16] Article 6.1 of the DSSA and cl. 2(a) of the Contract of Sale provides that no orders shall be cancelled, delayed or postponed by the buyer unless rejected in writing by the seller. Article 6.1 reads:

> Dealer shall submit all orders and projections in the format prescribed by Distributor. No order shall be cancelled, delayed or postponed by Dealer and each order shall remain binding upon Dealer unless rejected in writing by Distributor.

[17] Clause 2 of the Contract of Sale provides:

> No order shall be cancelled, delayed or postponed by the Buyer and each shall remain binding upon the Buyer unless rejected in writing by the Seller. The Buyer shall bear all costs, expenses and/or losses incurred by the Seller in the event of cancellation, delay or postponement of order.

[18] However what happened in reality was quite different. Through cross-examination of DW2, one Miss Keiko Ishigami, who was the Assistant Head of Sales of the defendant, it became evident that the defendant would issue Proforma Invoice for vehicles that were ordered and provide the plaintiff seven days to make payment. In the event that there was no payment received or in the event of notification from the plaintiff that it did not want to take the vehicles ordered, the defendant would then proceed to redistribute the vehicles to other dealers. Sometimes, there were confirmations by e-mail from DW2 to the plaintiff and at other times; there were no such notification for redistribution. The defendant did not notify, demand or inform the plaintiff that they were liable for any storage costs, interest subsidy or discount for vehicles redistributed. Neither was the plaintiff invoiced for such storage costs, interest subsidy or discount for vehicles redistributed. The defendant also did not notify the plaintiff that they must take and pay for the vehicles but rather voluntarily redistributed the vehicles without raising any objection. The plaintiff contended that most importantly the defendant did not call upon the bank guarantee during the term of the DSSA prior to the demand dated 23 December 2011, nor raised any objection that the plaintiff did not take possession of the said vehicles. In fact, DW3 one Miss Ng Lee Nee who was the Assistant Head of Finance and Accounts of the defendant, during cross-examination agreed that she was only tasked to calculate the purported losses in February 2009.

Whilst Article 7.3 DSSA provides that the dealer shall pay to the Distributor by telegraphic transfer remittance within three working days from notification, in practice this was not the case. Article 7.3 reads:

> Dealer shall pay to Distributor for MMC Vehicle by TT Remittance within three (3) working days from notification from the Distributor and the delivery will commence as soon as practicable once full payment has been confirmed by the Distributor.
>
> The Distributor reserves the right to request the Dealer to provide security against any order placed by the Dealer with the Distributor at the time of the Dealer's placing such orders.

[19] Clause 3 of the Contract of Sale further provides that:

> (a) The Buyer shall pay to the Seller for MMC Vehicles by TT Remittance within three (3) working days from notification from the Seller and delivery will commence as soon as practicable once full payment has been confirmed by the Seller.
>
> (b) In the event the Buyer's delays in payment, the Seller will impose an interest charge at the rate of one percent (1%) per annum above the base lending rate (BLR) of Malayan Banking Berhad commencing from the day after due date till the date of payment of the invoice amount. The foregoing rights of the Seller are in addition to, and not in lieu of, any rights or remedies it may have by law as an unpaid seller. In the event the buyer fails to pay the total value ordered, any expenses incurred or sustained by the Seller will be borne by the Buyer. The Seller reserved the right to reallocate the Goods ordered by the Buyer shall the buyer fail to fulfill the payment.

[20] Through the testimony of PW1, one Miss Yap Siew Ting who was the Chief Operating Officer of the plaintiff, and the cross-examination of DW2, the defendant had never practised or enforced the three-day payment term. In fact the defendant's Proforma Invoice contained the term "strictly within seven days from the Invoice date. Otherwise the stock will be released as free stock without notice."

[21] Article 7.4 DSSA provides that the dealer shall pay to the distributor all storage, handling, shipping charge and expenses occasioned by the plaintiff's failure to pay for vehicles. Article 7.4 under the heading of 'Failure of Financial Arrangement' reads:

> It is Dealer's sole responsibility to ensure the uninterrupted and unrestricted availability of sufficient funds to purchase and to pay for the MMC Products and Local Spare Parts.
>
> Should Dealer fail to pay for any MMC Products and/or Local Spare Parts ordered by Dealer in accordance with Section 7.3, Distributor may, with respect to any such MMC Products or Local Spare Parts (i) cause the same to be stored at the sole risk and expense of Dealer; or (ii) cause such MMC Products or Local Spare parts to be delivered elsewhere and Dealer shall pay to Distributor promptly upon demand all expenses sustained by Distributor in storing, handling and shipping occasioned thereby; or (iii) without obligation to pay any sum to Dealer, sell such MMC Products or Local Spare Parts directly to any other Authorised Dealer, person, firm or corporation, all expenses or losses occasioned thereby to be borne by Dealer.

[22] Learned counsel for the plaintiff contended that the defendant cannot be allowed to claim for storage costs, interest subsidy, discount and interest after the plaintiff had filed this claim because the storage costs, interest subsidy, discount and interest were never demanded by the defendant throughout the DSSA term. No notice was given to the plaintiff of any storage costs, interest subsidy, discount and interest chargeable for redistributed vehicles throughout the DSSA term. No notice was issued for the plaintiff to pay for the vehicles when the due dates in the Proforma Invoices passed and the defendant proceeded to redistribute the vehicles to other dealers. DW3 testified that she was only instructed to calculate the alleged losses sometime in February 2009. DW3 further testified that the invoices of redistributed vehicles were at their full selling price and whatever subsidies, interest, promotion were subsequently issued by way of payment vouchers. However, DW3 admitted that the payment vouchers were not exhibited in the bundle of documents filed. Learned counsel for the plaintiff submitted that failure to produce these payment vouchers would attract the application of s. 114(g) Evidence Act 1950.

Article 7.6 DSSA and clause 3(e) of the Contract of Sale allows the Defendant to realise any security interest for non-payment or default in payment.

[23] Article 7.6 provides as follows:

> As security for full payment of all sums Dealer owes to Distributor under this Agreement, whether such sums are now, or subsequently become due and owing, Dealer grants to Distributor, subject only to any prior perfected secured creditor's security interest (for which prior written consent of Distributor has been given for its creation), a security interest in all MMC Products and Local Spare Parts sold to Dealer by Distributor, and all proceeds thereof. Upon any non-payment of default in payment by Dealer, Distributor may accelerate any then existing debt and shall have all applicable rights. Upon Distributor's request, Dealer shall perfect Distributor's security interest.

[24] In cl. 3(e) of the Contract of Sale it is written:

> The Buyer shall establish a Security Deposit amounting to 10% of the total value of the order or establish RM500,000.00 Bank Guarantee in favour of "Mitsubishi Motors Malaysia Sdn Bhd". This Security Deposit or Bank Guarantee shall be forfeited against the Buyer's failure to make payment of any amount due to the

Seller by the due date of such payment or to take delivery of any Goods from the Seller in a timely manner. The Seller reserves the right to change the terms and conditions of the security to be provided by the Buyer.

[25] Through the cross-examination of DW2, it was admitted that the 80 vehicles were all redistributed prior to the demand dated 23 December 2008. It was also admitted that there was no method whatsoever to relate the vehicles to the particular Contract of Sale. DW3 also failed to show how the 80 vehicles could relate to the Contract of Sale.

[26] DW2 also sent an email dated 23 December 2008 to all dealers informing them that the Contract of Sales were being couriered on 23 December 2008 and 24 December 2008 when in fact the Contract of Sales were all dated prior to December 2008. Due to the failure to show the relation between the 80 vehicles and the Contract of Sales, the plaintiff submitted that the defendant was not entitled to call upon the bank guarantee.

[27] The defendant also admitted that none of the 80 vehicles were ever delivered to the plaintiff. Learned counsel for the plaintiff submitted that the defendant cannot now assert that it is entitled to keep the RM500,000 as losses suffered when the reason of the calling of the bank guarantee was for the non-payment of the purported 80 vehicles. In any event, the purpose of the bank guarantee was never for the provision of losses suffered by reason of storage costs, interest and discount.

[28] The Contract of Sales for the 80 vehicles were backdated and only sent on 23 and 24 December 2008 by courier as can be seen in the defendant's e-mail dated 23 December 2008 at p. 872 of bundle F.

[29] The plaintiff's evidence through PW1 is that because of plaintiff's proposal to terminate its sales division, the defendant had generated the Proforma Invoices for the 80 vehicles for the purpose of calling on the bank guarantee which would expire on 31 December 2008. This can be seen in the fact that the Proforma Invoices for all the 80 vehicles were all dated 23 December 2008.

[30] Plaintiff contended that the defendant acted unconscionably by altering the payment terms in the Proforma Invoices dated 23 December 2008 from the usual seven days to three days

knowing that the plaintiff could not verify the Proforma Invoices and pay the sum demanded within three days. Further the term under "Payment Terms-Strictly within seven days from the invoice date. Otherwise, the stocks will be released as free stocks without notice" were conspicuously missing.

Principles

[31] What is the true nature of the Contract of Sale where the Proforma Invoice is issued earlier with the term "if not paid within seven days the stock will be released as free stock without notice" and where the defendant by its conduct has evinced an intention not to be bound by the strict terms of the DSSA and the Contract of Sale.

[32] The plaintiff submitted that the conduct of the defendant in issuing Proforma Invoices that generally spelt more latitude in the terms exacted by the defendant, had led the plaintiff to believe that the terms of the Proforma Invoice had taken precedence over the terms of the DSSA and also the Contracts of Sale that were executed way after the Proforma Invoices were issued. It cannot be denied that the actual dealing between the parties were premised upon the Proforma Invoice which contain specific details of the vehicles ordered, which vehicles were released into the open market if the plaintiff did not pay within seven days of the Proforma Invoice. The plaintiff was never billed for the vehicles so released. Had the defendant wanted the plaintiff to pay for the vehicles so released or the losses it is said to have suffered, it should have indicated to the plaintiff of its intention. The least the defendant should have done was to have warned the plaintiff that it would have been fool-hardy to continue to place more orders when there were accumulated stocks not previously taken delivery of, which will be billed to the plaintiff. However that was not the case and the plaintiff was understandably lulled into the comfortableness of reckoning that each time it did not pay within seven days of the Proforma Invoice before it can take delivery of the vehicles, the vehicles will be released into the open market with no consequence to the plaintiff. The following month the plaintiff would once again proceed to place its orders for the vehicles it would need with the buffer it had been accustomed to, that it was at liberty to decide whether or not to take delivery of the vehicles when it has been invoiced for the same. There was

no issue or problem with this arrangement that had evolved which suited both parties, in that the defendant was not obliged to deliver until the vehicles had arrived in Malaysia and then the Proforma Invoice is issued and the plaintiff having an option then whether or not to take delivery of the vehicles for which it has been invoiced. Had the arrangement been otherwise, one would have expected the plaintiff to have been billed every month for the vehicles that could not be sold in the open market and the storage charges incurred, as well as the bank charges and discount on vehicles that had to be given to expedite the sale to open market. However there was nothing of that sort, with the plaintiff having ample justification to believe that the matter of the vehicles not taken up by it, which the defendant said it will then release into the open market, as a closed chapter.

[33] The unconscionable conduct of the defendant is crystal clear though in this case it was conduct both turbid and murky. For the entire duration of the contract from 9 April 2007 till 24 November 2008 there was not a trace of trouble as the defendant was undeniably satisfied with a dealer in the plaintiff that had met the minimum order and purchase of 141 vehicles for the next 17 months from the commencement of the dealership on 9 April 2007. In fact the plaintiff had purchased a total of 283 vehicles throughout the DSSA.

[34] It does not compute with common sense for the plaintiff to have outperformed the minimum expected of 141 vehicles purchased, only to be rudely awakened that there are 80 more vehicles for which it had not taken delivery and must now pay for them or suffer the bank guarantee of RM500,000 being forfeited! Had the plaintiff known of that, I am sure it would not have placed more orders to the tune of another 142 vehicles but would first have finished taking delivery of the 80 vehicles it had not earlier taken delivery within seven days of the Proforma Invoice.

[35] The only reason why the plaintiff did not take delivery of the 80 vehicles but continued every month to place orders for more was that the plaintiff had always understood that it had an option reinforced by the monthly conduct of the defendant that the vehicles not so taken delivery of would be released in the open market to other dealers. The plaintiff was never, in the following months and subsequent months, billed for these accumulative 80

vehicles or its storage charges, or finance charges or the losses suffered by the defendant in having to sell these 80 vehicles at a discount.

[36] It cannot be gainsaid that the sudden change in conduct of the defendant was triggered by the proposal of the plaintiff made on 24 November 2008 to downgrade from a 3S to a 2S centre. The unconscionable conduct of the defendant can be seen in how it sprang into action in searching for the total of 80 vehicles that it claimed that plaintiff had failed to pay and then invoiced the plaintiff accordingly and this time giving it only three days to pay and with no clause to say that the vehicles if not paid for within seven days, shall be released into the open market. It was an unholy haste to somehow by all means to make sure that it could then justify the calling on the bank guarantee which would have expired on 31 December 2008. When one looks at the date of all these invoices for the 80 vehicles, they are dated 23 December 2008 and payment is to be made on or before 26 December 2008. The payment was a whopping sum of RM9,368.035.10! The vehicles were not delivered presumably because the plaintiff failed to make payment for it and so the defendant proceeded to forfeit the bank guarantee of RM500,000.

[37] In view of the above, the plaintiff submitted that the Contract of Sales merely serves as a projection of the plaintiff's orders. The actual binding document was the Proforma Invoices. It appears to me that where the parties have conducted their business affairs and arrangements not in compliance with the terms of the original contract but at variance with it and have evinced by subsequent conduct an intention not to be bound by its original terms then such a conduct shall prevail in preventing the parties from reverting to the terms of the original contract where to do so would be both unreasonable and unconscionable in the circumstances of the case. The factual matrix of the present case would fall within the situation envisaged in *Pinsia Development Sdn Bhd & Ors v. Hj Abdul Hadi Ahmad & Ors* [2005] 1 CLJ 416 where Gopal Sri Ram JCA (later FCJ) crafted with characteristic clarity the following concise statement of the law at pp. 419-420:

> We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Tools v. Schuler A.G.* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. See,

American Surety Co of New York v. Calgary Mining Co Ltd [1919] 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (In Liquidation) v. Texas Commerce Bank* [1982] QB 84; *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

[38] I reckon no one could have expressed this proposition of law with more profound perspicuity than Lord Denning MR in *Amalgamated Investment & Property Co Ltd (In Liquidation) v. Texas Commerce Bank* [1981] 3 All ER 577 CA where at p. 583 His Lordship observed:

... If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

[39] I find the following succinct statement of the law by His Lordship Oliver LJ in *Habib Bank Ltd v. Habib Bank AG Zurich* [1981] 2 All ER 650 at p. 665 most helpful:

... We have been referred at length to a recent judgment of my own in *Taylor Fashions Ltd v. Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897, [1981] 2 WLR 576 in which I ventured to collect and review the authorities. I said this ([1981] 1 All ER 897 at 915- 916, [1981] 2 WLR 576 at 593):

> Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson* ([1866] LR 1 HL 129) principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, *it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment* rather than to inquiring whether the

A circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour. (emphasis added)

[40] The above passage of His Lordship Oliver LJ was quoted with approval in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001]1 CLJ 779 where at p. 804 Gopal Sri Ram JCA (later FCJ) explained as follows:

> The result of the judgment in *Habib Bank (ibid)*, of the cases therein cited and of the learning that has since flowed, including the decision of our Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd (supra)* may be summed up thus. A court is duty bound to approach the equitable doctrines of estoppel, laches or acquiescence – call them what you may, for they are all but species of the same genus – in a broad and flexible way, having regard to the justice of the particular case.
>
> The reason for such an approach is rooted in the history of the jurisdiction that the court is called upon to exercise. Whenever called upon to administer equitable concepts; be it doctrinal or remedial; you must not lose sight of the origins of the jurisdiction of a Court of Equity. It was founded upon a need to mitigate the rigidity of the common law so as to do justice according to the facts of a particular case. And in deciding where the justice of a given case lies, regard must be had to all its relevant circumstances, including the conduct of the respective litigants at all material times. A litigant whose hands are unclean, in the sense that he is guilty of unconscionable conduct relevant to an issue in immediate dispute, can hardly seek to invoke the protection of an equitable doctrine that is primarily designed to prevent injustice.

[41] The plaintiff submitted that the defendant is estopped from enforcing the terms of the DSSA and contract of sale with respect to invoicing for the 80 vehicles already redistributed in the open market by reason of their own contract.

[42] The defendant had by their conduct represented to the plaintiff or at least encouraged the plaintiff to believe that the 80 units of vehicles not taken delivery of by the plaintiff had already been cancelled. Throughout the term of the DSSA the defendant had issued Proforma Invoices with the terms "strictly within seven

days. Otherwise stock will be released as free stock without notice." In instances where the plaintiff did not make payment within seven days or where the plaintiff had written to expressly release the stock, the defendant did not refuse and/or object, nor demand to call on the bank guarantee, nor insist that the plaintiff must nevertheless be liable for the stock and pay for any loss and damage suffered by the defendant as a result. In any event the 80 vehicles were redistributed to other dealers at full price according to the invoices exhibited by the defendant.

[43] The plaintiff had every reason to believe that the orders were in fact cancelled because the defendant continued to make the plaintiff place new orders for vehicles for the following month and the succeeding months. Why would the plaintiff make new orders when there were outstanding vehicles not being taken? It is only logical and most probable in view of the conduct of the parties that the plaintiff proceeded to continue to make orders because the vehicles not taken were cancelled and could not be and were not allocated to the plaintiff any longer. If it were not so, it would have been the most unkindness cut of all for the defendant to stand idly by and lull the plaintiff into this trap and trouble.

[44] The defendant's actions were most unconscionable because shortly after the plaintiff's proposal to downgrade from a 3S centre to 2S centre, the defendant sought to "retrieve all orders of vehicles which were previously cancelled/redistributed, going contrary to the business arrangements that had evolved and emerged. Knowing that the vehicles had already been redistributed and could not be resold to the plaintiff, the defendant proceeded to issue the Proforma Invoices for 80 new vehicles with different chassis numbers. Knowing that there were in fact no Contract of Sales executed for the 80 vehicles, the defendant then sought to courier the back dated Contract of Sales stating they were for filing purposes. The plaintiff further theorised that knowing that the plaintiff could not verify such claims for 80 vehicles within three days as it was impossible to relate the vehicles to the Contracts of Sale, the defendant proceeded to alter the term of payment from seven days to three days because the bank guarantee was expiring on 30 December 2008.

[45] There had never been any indication that the plaintiff would be charged storage charges throughout the duration of the DSSA and it only became an issue when the plaintiff wanted to downgrade the centre from 3S to 2S that instructions were given to DW3 to come up with a claim for the so-called storage charges when these vehicles had already been redistributed, the finance charges, discount on the vehicles sold and the subsidy on interest on the vehicles sold. It was certainly nothing in the contemplation of the plaintiff and a matter totally foreign to the plaintiff.

[46] The defendant's argument is that the release and reallocation of the 80 vehicles to other dealers after the expiry of the payment date does not amount to a cancellation of the orders. Whilst that might be the position of a pure literal approach in interpreting the various clauses in the DSSA and the Contracts of Sale, the dynamism of the conduct of the parties had given way to the purposeful and practical approach with respect to pushing the sales such that there was never an issue with the 80 vehicles released to other dealers.

[47] It was admitted by PW1 that there were orders for 201 vehicles and that payments were made for 137. That would leave only 64 vehicles not paid for. However the defendant had not taken into consideration that another 16 vehicles were purchased based on spot orders. For such 'spot orders' if there is available stock for that model, the defendant would deliver the units to the plaintiff after receiving full payment for the said vehicles. This is certainly not a case of poor performance on the part of the dealer but one where the dynamics of the market place and customers needs and preferences are not always easy to juggle and parties had allowed their business arrangement to evolve to such a state in line with their common objective of pushing sales.

[48] The plaintiff suffered loss and damage as a result of relying on the defendant's representation that the 80 vehicles had already been cancelled previously. The plaintiff's loss is the bank guarantee amount of RM500,000. None of the 80 vehicles were ever delivered to the plaintiff presumably because the plaintiff had not paid for it and for that the defendant confidently asserted that the sum of RM500,000 is to be forfeited to the defendant. I must in the circumstances set out above reject such an audacious assertion which is completely at variance with the business arrangement that the parties had avidly followed.

Whether The Defendant As Distributor Had Unconscionably Called On The Bank Guarantee In The Circumstances Of The Case

[49] The plaintiff submitted that the bank guarantee was furnished as security deposit for purchasing Mitsubishi cars. These are the words contained in the bank guarantee. The bank guarantee was not for the purpose of recovering any (alleged) loss or damage suffered by the defendant.

[50] I find merits in the plaintiff's submission that the defendant's basis for calling on the bank guarantee that is premised upon the Proforma Invoices for the 80 vehicles dated 23 December 2008 is wrong and unlawful because:

(a) The Proforma Invoices for the 80 vehicles dated 23 December 2008 were not genuine orders by the plaintiff and/or were in fact orders retrieved from previous cancelled orders;

(b) The 80 vehicles could not be attributed in any manner to any particular Contracts of Sale;

(c) If the 80 vehicles were in fact different vehicles from the 80 redistributed then the basis of the calling on the guarantee would have occurred at the time when the previous 80 vehicles were not taken and redistributed.

[51] In the case of *Teknik Cekap Sendirian Berhad v. Public Bank Berhad* [1995] 4 CLJ 697, the Court of Appeal held that the defendant had failed to assert the very basis of calling on the bank guarantee and consequently the payment ought to be returned.

[52] The plaintiff submitted that the bank guarantee amount cannot be kept by the defendant to account for loss and damages as testified by DW1 and DW3 because:

(a) The parties intended for the bank guarantee to be a 'security deposit' as stated in para. 1 of the bank guarantee; and

(b) The defendant's basis for calling on the bank guarantee was premised upon the outstanding 80 vehicles in the Proforma Invoices dated 23 December 2008.

[53] The plaintiff submitted that the defendant is not entitled to the damages claimed because the same were never informed or demanded at that time of redistribution. The plaintiff did not have any knowledge that they were obliged to pay the sums otherwise the plaintiff would have refused the orders and most certainly would not have continued adding more orders for each month to its detriment. I would readily agree with that submission.

[54] The plaintiff submitted that the defendant is now estopped from claiming by way of back charges alleged losses after the plaintiff filed this claim. Most importantly the defendant failed to show that any discount or subsidy of any kind was in fact given to other dealers. DW3 admitted that defendant had not tendered such evidence and that the alleged losses were only tabulated in February 2009.

[55] The defendant's contention is that the plaintiff had breached cl. 3(a) of the Contracts of Sale when the plaintiff refused to pay for and take delivery of these 80 Vehicles ordered. To date the payment remains outstanding. All 80 Vehicles had been ordered by the plaintiff and the plaintiff had signed Contracts of Sale in respect of all 80 Vehicles ordered.

[56] Due to the breach of cl. 3(a) of the Contracts of Sale, the defendant states that it had the right to call on the bank guarantee of RM 500,000 pursuant to cl. 3(e) which provides:

> The Buyer shall establish a Security Deposit amounting to 10% of the total value of the order or establish RM 500,000.00 Bank Guarantee in favour of "Mitsubishi Motors Malaysia Sdn Bhd". This Security Deposit or Bank Guarantee shall be forfeited against the Buyer's failure to make payment of any amount due to the Seller by the due date of such payment or to take delivery of any Goods from the Seller in a timely manner. The Seller reserves the right to change the terms and conditions of the security to be provided by the Buyer.

[57] *Vide* a letter from the defendant to AmBank dated 30 December 2008, the defendant wrote to AmBank calling on the bank guarantee of RM500,000 and the said RM500,000 was paid to the defendant on 6 February 2009.

[58] It was submitted by learned counsel for the defendant that the court's duty is to give effect to the bargain of the parties according to their intention and when that bargain is in writing

the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. In this regard, reference is made to the judgment of Mohd Ghazali Yusoff JCA (later FCJ) in the case of *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294 where at p. 301 it was observed:

> In the *Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said:
>
> > In considering the disputes of the parties I must first of all bear in mind the general principle of construction of contract as enunciated in the *National Coal Board v. Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p. 560:
> >
> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
>
> In *Central Bank of India v. Hartford Fire Insurance Co Ltd.* AIR [1965] SC 1288; the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p. 1290:
>
> > Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. It those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[59] If there are doubts as to whether the reverse of the above would be offending s. 92 of the Evidence Act, such doubts can be easily dismissed by reference to the *dicta* of Gopal Sri Ram JCA (later FCJ) in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd (supra)* where at pp. 789-790 His Lordship explained:

> That brings me to the question of admissibility. In my judgment, s. 92 of the Evidence Act had nothing whatever to do with this case. The judge was in error when he thought that it did. The appellants were not seeking to admit evidence to contradict the terms of the agreements that had been entered into. They wanted the court to see the real transaction behind the facade of the agreements. That this is permissible is settled by high authority. I will not go through all the cases here. Suffice that I mention just one.
>
> In *Gangabai v. Chhabubai* AIR [1982] SC 20 at p. 23, the Supreme Court of India rendered the following exposition on s. 92 of the Indian Evidence Act, upon which our statute is based:
>
> > The next contention on behalf of the appellant is that sub-section (1) of section 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parol evidence in support of the contention.
> >
> > Section 91 of the Evidence Act provides that when the term of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Sub-section (1) of s. 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to s. 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any

> contracting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-section (1) of *section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself* and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. *The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham.* Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties: *Tyagaraja Mudaliyar v. Vedathanni* AIR [1936] PC 70. (emphasis added.)

[60] The defendant submitted that it is duty bound to try to mitigate its losses (see *Kabatasan Timber Extraction Company v. Chong Fah Shing* [1969] 1 LNS 63 FC. It would be unreasonable for the defendant to keep the 80 outstanding vehicles in its store for an unspecified period of time. Hence, the outstanding vehicles were ultimately sold to other dealers to mitigate the defendant's losses. Whilst that may be true, the dominant purpose of the release of the 80 vehicles and its reallocation was the optimisation of the sales of the vehicles such that both the distributor and dealer benefit in the overall common objective of maximising sales to nobody's detriment. Indeed trouble starts only when the distributor tries to do this to the detriment of the dealer like invoicing the dealer for 80 vehicles in one go and expecting the dealer to pay RM9 million plus within three days on the pain and penalty of the RM500,000 being forfeited.

Other Claims Of The Plaintiff And The Defendant's Counterclaim

[61] The plaintiff is also claiming the sum of RM8,274.45 (as at 30 June 2009) for the interest it had to pay to AmBank for the RM500,000 bank guarantee. However this court is of the view that that interest loss is already covered by the claim of

RM9,307.51 (as at 30 April 2010) being interest which it said it would have earned on the sum of RM 500,000 being the fixed deposit that it had placed with AmBank for the issuance of the bank guarantee. In the circumstances, this court shall allow the plaintiff's claim of RM9,307.51 being "compensation for any loss or damage caused, that naturally arose in the usual course of things" from the unlawful and unconscionable call by the defendant as the bank guarantee, within the meaning of the first limb of s. 74(1) of the Contracts Act 1950.

[62] Section 74(1) of the Contracts Act reads as follows:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

[63] The plaintiff is also claiming the sum of RM33,000 being the loss of rebate of RM3,000 per vehicle purchased from another distributor, Hino Motors (M) Sdn. Bhd. The plaintiff said that it had intended to use the RM500,000 for another bank guarantee and letter of credit of RM200,000 for Hino Motors (M) Sdn. Bhd. in order to enjoy the said rebate of RM3,000 per vehicle.

[64] The plaintiff through PW1 said that it suffered a loss of RM33,000 because it did not qualify for the rebate as it was unable to furnish the bank guarantee or the letter or credit.

[65] I am of the view that such a claim is too remote and does not come within the second limb of s. 74(1) of the Contracts Act 1950, "which the parties knew, when they made the contract, to be likely to result from the breach of it". In any event, the plaintiff had not made known this fact to the defendant when the defendant wanted to call on the bank guarantee.

[66] As for the defendant's counterclaim, I find that the plaintiff cannot in the circumstances set out above, be said to be in breach of the DSSA and the Contract of Sales. As such, the defendant has no basis for its counterclaim and it appears that it was only contrived and calculated after the plaintiff had filed its claim. As can be clearly seen, the plaintiff was never billed or invoiced for the storage charges, finance charges, loss for discount for resold vehicles and interest rate subsidy loss.

Pronouncement

[67] Having held that in all the circumstances of the case the calling on the bank guarantee by the defendant was unconscionable and unlawful, I granted the prayers in (a), (b) and (c) of the amended statement of claim as set out above and ordered the sum of RM500,000 to be paid to the plaintiff by the defendant together with the loss of interest of RM9,307.51 on the fixed deposit pledged for the issuance of the bank guarantee. Interest shall be at 4% per annum from date of the original writ to realisation. The other claims for damages of the plaintiff are too remote and have not been proved on a balance of probabilities and are thus dismissed.

[68] In the circumstances, the defendant's counterclaim was dismissed. I also awarded costs of RM25,000 to the plaintiff and the allocatur is to be paid before extraction of the certificate of costs.